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Supreme Court, U.S.
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No. 00-973

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ALPHONSO VONN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. This Case Does Not Involve An Unconstitutional Guilty Plea

Respondent suggests that, because the district court did not advise him at the plea proceeding of his right to the assistance of counsel at trial, his guilty plea was unintelligent and therefore taken in violation of the Constitution.[1] That contention goes beyond the Rule 11

[1] Respondent's brief is inconsistent on whether there was constitutional error in the district court's acceptance of his guilty plea. In one footnote, respondent directly argues that his plea was unintelligent. See Br. 30 n.17. Elsewhere, however, respondent argues more tentatively that the kind of Rule 11 error that occurred in this case "affect[s]" the constitutionality of the plea (Br. 19), "ha[s] the potential for rising to the level of constitutional error[]" (Br. 27), and "potentially result[s] in involuntary or

issues that were resolved in the court of appeals and on which certiorari was granted. The court of appeals did not hold that respondent's guilty plea was not intelligently made and was therefore constitutionally invalid. Rather, the court of appeals' decision rested squarely on the district court's Rule 11 error. See Pet. App. 3a, 4a-5a. As a consequence, the only questions properly presented in this case concern the standard and scope of appellate review of Rule 11 error when that specific claim of error has not been made in the district court.

Respondent's argument that his plea was constitutionally invalid because the court did not specifically advise him at his plea proceeding of his right to counsel at trial also fails on the merits. This Court has never held that the Constitution requires that a criminal defendant be specifically advised *by the court* of the constitutional rights that he waives by pleading guilty, much less that he be so informed at the time he enters his guilty plea. Such a decision would amount to ruling that the procedures of Rule 11 are compelled by the Constitution, a holding that this Court has rejected.[2]

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unintelligent (and therefore unconstitutional) pleas" (Br. 33 n.21). In the court of appeals, respondent presented this case as a challenge to the Rule 11 colloquy and maintained only in passing that there was constitutional error in the plea. See Resp. C.A. Br. 14.

[2] See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969) (noting that "the procedure embodied in Rule 11 has not been held to be constitutionally mandated"); *Halliday* v. *United States*, 394 U.S. 831, 832-833 (1969) (sustaining, against collateral challenge, a guilty plea accepted in violation of Rule 11 before *McCarthy*, in light of district court's finding that Halliday had entered his plea "voluntarily and with an understanding of the nature of the charges against him," and also noting that a "large number of constitutionally valid convictions * * * may have been obtained without full compliance with Rule 11"). In *Halliday*, the defendant

In *Boykin* v. *Alabama*, 395 U.S. 238 (1969), the Court established a rule that a guilty plea may not be accepted "without an affirmative showing that [the plea] was intelligent and voluntary," *id.* at 242, and in particular that the defendant had waived three specific, "important federal rights"—the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers, *id.* at 243.[3] The Court did not suggest, however, that specific advice to the defendant from the court about the rights waived by the plea, at the time the plea is entered, is necessary for such a showing. Moreover, the Court has stated that a guilty plea may be constitutionally invalid if the defendant was not informed by the court *or counsel* about certain fundamental matters, such as the nature of the charges.[4] Thus, this Court's decisions do not support

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sought to withdraw his plea on the ground that the district court never explained the nature of the charge against him or informed him of the maximum possible sentence. See *Halliday* v. *United States*, 262 F. Supp. 325, 328 (D. Mass.), vacated, 380 F.2d 270 (1st Cir. 1967). The district court found that, although the court that took his plea did not question Halliday about his understanding of the charges against him, nonetheless the plea was constitutionally valid because Halliday's counsel had explained the charges to him, and Halliday understood the nature of those charges. See *Halliday* v. *United States*, 274 F. Supp. 737, 737-739 (D. Mass. 1967), aff'd, 394 F.2d 149 (1st Cir. 1968), aff'd, 394 U.S. 831 (1969).

[3] As respondent observes (Br. 13 n.3), the Court in *Boykin* did not identify the right at issue in this case, the right to the assistance of counsel at trial, as one of the constitutional rights for which an "affirmative showing" of a valid waiver must appear on the record.

[4] See *Henderson* v. *Morgan*, 426 U.S. 637, 642 (1976) (noting that Morgan's lawyers "did not explain the required element of intent" to him); *id.* at 646 (similarly noting that Morgan's lawyers "did not explain to him that his plea would be an admission" that he acted with the requisite intent for second-degree murder); *id.* at

the proposition that a guilty plea obtained without the full advice of constitutional rights from the court required by Rule 11 is necessarily unintelligent or constitutionally deficient.

In any event, respondent *was* advised before entering his guilty plea that he had the constitutional right to the assistance of counsel at trial. At the post-indictment arraignment, the court specifically informed respondent that he was entitled to be represented by counsel at all stages of the proceedings, and that the court would appoint counsel to represent him if he could not afford retained counsel. J.A. 22. On the same date, respondent signed a statement acknowledging his constitutional rights, including the right "to be represented by counsel at all stages of the proceedings" and to have appointed counsel if he could not afford to retain an attorney. J.A. 26. Respondent confirmed in open court that he had heard and understood the court's statements "[p]ertaining to [his] rights and the appointment of counsel," and that he had seen and signed the statement of those rights. J.A. 25. His attorney also confirmed in writing that respondent understood his rights. J.A. 29. The record thus establishes not only compliance with *Boykin*, but also that respondent was informed of his constitutional right to counsel at trial, and thus that respondent intelligently waived that right when he pleaded guilty.

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647 (observing that "[n]ormally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused").

2. Rule 11(c)(3) Errors Are Subject To Plain-Error Review If Raised For The First Time On Appeal

Respondent argues (Br. 16) that the plain-error principles of Rule 52(b) are inapplicable to any Rule 11 error, and also that the harmless-error principles of Rule 11(h) and Rule 52(a) are inapplicable to any Rule 11 error that "goes to the essence of whether the plea was voluntary and intelligent." Respondent thus argues (Br. 28) for a rule of automatic reversal for Rule 11 errors that have "the *potential* of causing an involuntary or unintelligent plea" (emphasis added); *id.* at 33 n.21. Those contentions are incorrect.[5]

a. *The text and background of Rule 11.* There is no basis in the text of Rule 11(h) to suggest that some subset of Rule 11 errors may not be found harmless. Rule 11(h) states that "*[a]ny* variance from the procedures required by this rule which does not affect substantial rights shall be disregarded" (emphasis added). The requirement that the court inform the defendant of his right to the assistance of counsel at trial is one of the "procedures required by this rule," specifically in Rule 11(c)(3), and is thus subject to harmless-error review.

Respondent's argument that harmless-error principles never apply to deviations from Rule 11(c)(3) is also inconsistent with the Advisory Committee's Note accompanying Rule 11(h). As respondent observes (Br. 19), that Note gave, as an example of the kind of Rule 11 error that could be deemed harmless, the court's

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[5] These are different questions from the question whether acceptance of a truly involuntary or unintelligent guilty plea can be harmless error, which is not presented in this case. As we have explained, respondent's guilty plea was made with knowledge of his constitutional right to counsel at trial, and so his guilty plea was intelligently made. See p. 4, *supra*.

failure to inform the defendant of an essential element of the offense (which is required by Rule 11(c)(1)). See Fed. R. Crim. P. 11(h) advisory committee's note (1983) (discussing *United States* v. *Coronado*, 554 F.2d 166 (5th Cir.), cert. denied, 434 U.S. 870 (1977)). But that kind of error is surely one that, in respondent's formulation, might "affect" the intelligence of a guilty plea (see Br. 18-19). It has long been held that a constitutionally valid guilty plea requires that the defendant have notice of the nature of the charge against him. See *Bousley* v. *United States*, 523 U.S. 614, 618-619 (1998); *Henderson* v. *Morgan*, 426 U.S. 637, 645-647 (1976).[6] Thus, the Advisory Committee's Note refutes respondent's argument that the Committee intended to exempt from harmless-error analysis deviations from procedures of Rule 11 designed to ensure that a guilty plea is entered voluntarily and intelligently.[7]

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[6] *Coronado* involved the district court's failure to explain adequately to the defendant the nature of a conspiracy charge. See 554 F.2d at 172. The court of appeals in that case plainly understood the error as bearing on the core purpose of Rule 11, to ensure voluntary and intelligent guilty pleas. See *id.* at 172 n.8 (relying on *Henderson* v. *Morgan*, in which the defendant pleaded guilty without having been informed by either the court or counsel of an essential element of the offense of second-degree murder).

[7] As respondent notes (Br. 17-18), Rule 11(c)(5) was amended in 1982 to require the court to advise the defendant that his answers to questions under oath could form the basis of a perjury prosecution *only* if the court actually intended to question the defendant under oath about the offense. At that time, the Advisory Committee observed that Rule 11's requirement of warning the defendant about a potential perjury prosecution was "qualitatively distinct" from other requirements of the Rule, and expressed concern about vacatur of guilty pleas based on deviations from marginal requirements of Rule 11. See Fed. R. Crim. P. 11(c)(5) advisory committee's note (1982). Contrary to respondent's reading, however, the 1982 Advisory Committee's Note did not distinguish between those aspects of Rule 11 that were designed to ensure a constitutionally voluntary and intelligent plea and those that were not so designed. Rather, the Advisory Committee, quoting *United States* v. *Sinagub*, 468 F. Supp. 353 (W.D. Wis. 1979), distinguished between Rule 11(c)(5) and those requirements of Rule 11 that "go to whether the plea is knowingly or voluntarily made, *[or] to whether the plea should be accepted and judgment entered*"— including such nonconstitutional mandates as Rule 11(f), requiring that the court determine that the plea has a factual basis. See Fed. R. Crim. P. 11(c)(5) advisory committee's note (1982) (quoting *Sinagub*, 468 F. Supp. at 358 (emphasis added)).

Respondent also observes (Br. 20-21) that the cases cited by the Advisory Committee in support of the adoption of Rule 11(h) were cases in which no objection to the district court's deviation from Rule 11 had been made in the lower court. Thus, respondent hazards, the Advisory Committee must have assumed that the harmless-error principle of Rule 11(h), rather than the plain-error standard of review, would apply in such cases. No such inference can be drawn from the Advisory Committee's Note, however. Before Rule 11(h) was adopted, this Court had held in *McCarthy* v. *United States*, 394 U.S. 459, 471 (1969), that "prejudice inheres in a failure to comply with Rule 11," whether or not the district court's noncompliance with the Rule might have affected the plea. In most cases, the record on its face would have demonstrated whether the district court had complied with Rule 11. A reviewing court could therefore have readily determined whether the defendant was "prejudiced" under *McCarthy*, with-

out regard to whether the objection was raised below.[8] But once the Federal Rules rejected the automatic-reversal rule of *McCarthy* and required an effect on "substantial rights" to warrant reversal (Fed. R. Crim. P. 11(h))—that is, an effect on the outcome of the proceeding (see U.S. Br. 29-35)—the distinction between harmless error and plain error, and consequently the importance of raising a claim of error in district court, became significant.

There is no merit to respondent's argument (Br. 20) that, because Rule 11(h) borrowed the harmless-error language of Rule 52(a) but not the plain-error language of Rule 52(b), the Court should draw the negative inference that Rule 11(h) was intended to preclude reliance on plain-error principles. As we have shown (U.S. Br. 22-23), the text of Rule 11(h) establishes only that the automatic-reversal rule under *McCarthy* had been repudiated, and that a reviewing court *must* disregard Rule 11 errors (like other errors) that *do not* affect substantial rights. Rule 11(h) does not, however, address how a reviewing court should treat errors that might have been prejudicial but were not brought to the attention of the lower court. Accordingly, the usual background principles of procedural default come into effect. Significantly, the limiting principles of plain-error review that normally apply to forfeited claims do not derive exclusively from the text of Rule 52(b), but

[8] That point also explains why, as respondent observes (Br. 25), this Court noted in *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979), that the defendant could have raised his claim of Rule 11 error on direct appeal, even though he had not raised it in the district court. Since the Rule 11 error in that case would have appeared on the face of the record and would have automatically required reversal on appeal, the defendant's failure to raise it in district court was not significant.

also stem from long-established judge-made rules confining relief for forfeited claims. See U.S. Br. 22-23 n.9; *United States* v. *Olano*, 507 U.S. 725, 735-737 (1993). Accordingly, once the automatic-reversal rule of *McCarthy* was abandoned, the general principles of plain-error review became applicable, even without inserting a carbon copy of Rule 52(b) into Rule 11.

b. *The objectives of Rule 11.* Respondent further argues (Br. 21-22) that the purposes of Rule 11 counsel against plain-error review of Rule 11 errors. First, he argues that, because the court has an independent duty to advise the defendant of the constitutional rights that he waives by pleading guilty, it should not be necessary for a counseled defendant to preserve a claim that the court has not complied with the Rule. This Court has not suggested, however, that, merely because the court has an independent obligation to comply with procedural rules, a defendant is relieved of the responsibility to make a contemporaneous objection when the court fails to comply.

Respondent notes (Br. 22) that, in *Barker* v. *Wingo*, 407 U.S. 514, 523-528 (1972), the Court rejected an absolute "demand-waiver" rule, under which a defendant would have been flatly barred from raising a claim under the Speedy Trial Clause unless and until his counsel had asserted a demand for a speedy trial. This case, however, does not involve any issue of *waiver*; rather, the question is whether a more restrictive standard of appellate review should be applied when the claim of Rule 11 error is raised for the first time in the court of appeals. See *Olano*, 507 U.S. at 733-734 (distinguishing waived claims from forfeited claims that may be reviewed for plain error). Moreover, the Court in *Barker* stated that "a defendant has some responsibility to assert a speedy trial claim" in the trial court,

407 U.S. at 529, and the courts of appeals have applied plain-error review to claims under the Speedy Trial Clause and the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, that were not first presented to the district court.[9] They have done so, moreover, even though, as with Rule 11, the district court has an obligation to ensure compliance with the deadlines of the Speedy Trial Act. See, *e.g.*, 18 U.S.C. 3161(c)(1) ("the trial * * * *shall commence* within seventy days from the filing date * * * of the information or indictment") (emphasis added).

Second, respondent argues (Br. 22-23) that the constitutional requirement that a guilty plea be voluntary and intelligent reflects a right that is personal to the defendant and cannot be waived or forfeited by counsel. But, as explained above (p. 4, *supra*), there is no basis in this case for a conclusion that respondent's guilty plea was involuntary or unintelligent. Rather, the question is whether respondent's counsel should have brought to the attention of the district court the fact that it had omitted part of the advice required by Rule 11. The purpose of the advice is to ensure that a guilty plea be voluntary and intelligent (and that a record of the defendant's knowledge accompanying his waiver be made). The absence of that advice, however, does not by itself mean that the plea is *constitutionally* invalid; as respondent acknowledges (Br. 28), the deviation from Rule 11 creates only the "potential" for a constitutional violation. And, as respondent points out

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[9] See *United States* v. *Hayes*, 40 F.3d 362, 366 (11th Cir. 1994) (constitutional claim), cert. denied, 516 U.S. 812 (1995); *United States* v. *Asubonteng*, 895 F.2d 424, 428 (7th Cir.) (same), cert. denied, 494 U.S. 1089 (1990); *United States* v. *Baker*, 40 F.3d 154, 158-159 (7th Cir. 1994) (statutory claim), cert. denied, 514 U.S. 1028 (1995).

(Br. 23), given the clarity of Rule 11's command and its central role in thousands of federal criminal prosecutions every year, "[a]ll the parties"—including, no doubt, respondent's trial counsel—"know what Rule 11 requires." Respondent's trial counsel thus had an obligation to ensure that his client's guilty plea was entered after a colloquy that conformed to the requirements of that Rule.

Third, respondent discounts (Br. 23-24) the possibility that defense counsel might seek to manipulate the district court's failure to give all the advice required by Rule 11 for strategic advantage, but that concern is real. Defendants are not infrequently dissatisfied with the sentences they receive, even when they have been advised of the statutory maximum sentence and even when they have been warned in plea agreements and in Rule 11 colloquies that the district court is not bound by a sentencing recommendation agreed to in a plea agreement. See Fed. R. Crim. P. 11(c)(1), 11(e)(1)(B), 11(e)(2). A district court might decide, contrary to the expectations of the defendant and the government, that a different Guidelines sentencing range is applicable, or decide to depart upward from the applicable range. Such a decision might leave the defendant with a sentence that is considerably higher than the one he expected or hoped for, even though he had no legal entitlement to a lower sentence. In such a case, a defendant and his counsel might well conclude that it is in the defendant's best interest to attempt to overturn the plea. Under respondent's submission, the district court's failure to advise a counseled defendant in his plea colloquy that, if he went to trial he would have the right to counsel at that trial, would provide the defendant with a free pass to later overturn his plea, even where (as here) the defendant had previously

been informed that he had the right to counsel at trial. Indeed, reversal would be mandated even if the defendant's counsel was aware of the court's deviation from Rule 11's requirements but had intentionally said nothing in order to retain the option to void the plea. That result is not consistent with sound practice.

3. A District Court's Failure To Comply Fully With Rule 11(c)(3) Is Plain Error Only If It Affected The Outcome Of The Proceedings

Respondent argues (Br. 26-36) that a district court's acceptance of a guilty plea that is not voluntary and intelligent can never be harmless error. This case, however, does not present that question, because respondent's guilty plea is not constitutionally flawed. See p. 4, *supra*. Rather, the question here is whether, when a defendant has entered a voluntary and intelligent guilty plea but the Rule 11 proceeding was defective in some way, a court must vacate the plea even if the defect did not materially affect the outcome of the proceedings. The correct answer is "no."

That conclusion follows from two points. First, contrary to respondent's submission (Br. 30-32), there is no basis to conclude that a Rule 11 error that does not affect the constitutional validity of a guilty plea is "structural error" that cannot be subjected to harmless-error analysis. Rule 11(h) repudiated that premise by providing that Rule 11 error can be harmless and on such occasions should be disregarded. See Fed. R. Crim. P. 11(h) advisory committee's note (1983) ("Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11."). And, because Rule 11(h) does not "attempt to define the meaning of 'harmless error,' which is left to the case law" (*ibid.*), the prejudice analysis should be the same as conventional prejudice analysis for other kinds of errors: a material effect on the outcome of the proceeding. See U.S. Br. 31-35.

Second, even when a defendant can show some form of prejudice from a Rule 11 error, a reviewing court should not exercise its discretion to reverse for plain error unless the error "seriously affect[ed] the fairness, integrity or public reputation" of the proceeding. *Olano*, 507 U.S. at 736 (citation omitted). At a minimum, if a plea is voluntary and intelligent, and if there is no reason to believe that the district court's failure to comply fully with Rule 11 materially affected the defendant's decision to enter that plea, the defendant has no claim that his conviction is fundamentally unfair. Public confidence in the justice system would not be promoted by the court of appeals' exercise of its discretion to vacate such a conviction.

Respondent argues (Br. 36-38) that the application of plain-error review to Rule 11 errors not raised in the district court would insulate "[v]irtually [a]ll [p]leas from any [a]ppellate [r]eview," because a defendant would never be able to show on appeal that he would not have pleaded guilty had the district court complied with Rule 11. Defendants do, of course, generally find it more difficult to establish prejudice under plain-error review than under harmless-error principles, and properly so. See *Olano*, 507 U.S. at 734; *id.* at 742 (Kennedy, J., concurring). But in fact, courts of appeals applying plain-error review have vacated guilty pleas because of noncompliance with Rule 11. For example, in *United States* v. *Gandia-Maysonet*, 227 F.3d 1, 4-5 (1st Cir. 2000), the court of appeals concluded that, in light of the district court's failure to give an adequate explanation of an intent element of the defendant's offense, in violation of Rule 11(c)(1), and the fact that

the evidence of that element of intent was not overwhelming, the defendant might not have pleaded guilty had the district court properly explained the nature of the charge to him. Similarly, in *United States* v. *Quinones*, 97 F.3d 473, 474-475 (11th Cir. 1996), the court of appeals concluded that the district court's failure to explicate the nature of a firearms charge violated the defendant's substantial rights and was plain error requiring reversal. While those cases involved error under Rule 11(c)(1) rather than (as in this case) Rule 11(c)(3), there may also be circumstances in which a court might conclude, based on a particular record, that a defendant probably would not have entered a guilty plea if the district court had properly advised him that he was relinquishing a particular right by pleading guilty. There is no reason to doubt that courts of appeals will appropriately exercise their discretion under Rule 52(b) in cases involving Rule 11 errors.

4. The Entire Record Of The Case Should Be Considered In The Prejudice Determination

Respondent argues (Br. 38-45) that, in determining whether a Rule 11 error warrants reversal, the court of appeals should consider only what the defendant said or was told at the Rule 11 hearing, and not any information, no matter how relevant, contained elsewhere in the official record of the case. That contention should be rejected.

For a guilty plea to be constitutionally valid, a defendant must act voluntarily and intelligently at the time that he enters his plea. *Brady* v. *United States*, 397 U.S. 742, 749-758 (1970). It does not follow, however, that only the information that was imparted to the defendant at the guilty plea hearing is relevant to that determination. Although *Boykin* established a requirement of an affirmative showing on "the record" that a guilty plea was voluntary and intelligent (see 395 U.S. at 242), the Court did not suggest that "the record" in such cases is limited to the record of the hearing in which the guilty plea is entered. Moreover, *Bousley* v. *United States*, *supra*, supports the conclusion that the entire record in the case must be considered. There, the Court noted that, when a criminal defendant was provided at an earlier stage of the proceeding with a copy of an indictment that accurately set forth the nature of the charge against the defendant, "[s]uch circumstances, standing alone, [gave] rise to a presumption that the defendant was informed of the nature of the charge against him." 523 U.S. at 618; see also *Henderson* v. *Morgan*, 426 U.S. at 647. Under that analysis, if the record of the case establishes that at an earlier point in the prosecution, the defendant was provided with the information that he should have been provided at his guilty plea hearing, there is at least a presumption that the defendant's plea was voluntary and intelligent.[10]

There is no merit to respondent's speculation (Br. 42-43) that a defendant might not pay sufficient attention

[10] Of course, even if a defendant is properly and adequately informed at an earlier stage in the proceedings of the nature of the charge against him and of his constitutional rights, events after that point might render a plea involuntary or unintelligent—as in *Bousley*, where the defendant was initially provided a copy of the indictment but was subsequently given misinformation about the nature of the charge. 523 U.S. at 618. But that point establishes only that the presumption that the plea is voluntary and intelligent that arises from a showing that the defendant was given proper information may be rebutted; it does not suggest that only information given to the defendant at his guilty plea hearing may satisfy the requirements of *Boykin*.

to advice that he is given about his constitutional rights at trial when he appears for his initial appearance or his arraignment. If, as in this case, a defendant is expressly informed both orally and in writing of his constitutional right to counsel at trial, and if he confirms that he understands that he has that right, at the least a presumption should arise that his subsequent actions are taken with knowledge and understanding of the existence of that right. Unusual cases may arise in which that presumption could be rebutted, but that would surely not be the ordinary case. There is no reason to believe that, as a systematic matter, defendants would fail to attend to a judge's advice about the right to counsel at trial with the appropriate seriousness.

Respondent notes (Br. 39-40) that both *Boykin* and Rule 11 set forth prophylactic rules designed to avoid collateral challenges to the constitutional validity of guilty pleas, and also likens the advice required by Rule 11 to the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The prophylactic rules of *Miranda* and *Boykin*, however, are of a different order than those of Rule 11, because they are themselves constitutionally based. See *Dickerson* v. *United States*, 530 U.S. 428, 439-400 (2000); *Boykin*, 395 U.S. at 242-244. The procedures of Rule 11 are not themselves required by the Constitution, and when the record affirmatively establishes—as it does here—that the defendant was given the information necessary to ensure that his guilty plea is voluntary and intelligent and would not be vacated for constitutional error, there is no basis for a reviewing court to blind itself to that fact when considering the effect of the Rule 11 error on the proceeding.

Respondent objects (Br. 41-42) that such an approach to prejudice is unduly complicated and might lead the

court to explore information that the defendant might have obtained from other sources, such as other legal proceedings and popular culture. The rule of *Boykin*, however, necessarily minimizes that objection, because, under *Boykin*, if "the record" does not affirmatively establish that the defendant was informed of the nature of the charge against him and of certain constitutional rights that are waived by pleading guilty (see 395 U.S. at 243), then the guilty plea is constitutionally invalid. But since the entire record of the case may be consulted to determine whether a guilty plea is constitutionally valid (see pp. 14-15, *supra*), the same information should also be considered in determining whether any Rule 11 error was prejudicial.

Respondent further argues (Br. 43) that only the record of the Rule 11 hearing may be considered because a constitutionally valid guilty plea requires that the record show, not just that the defendant understood that he has certain constitutional trial rights, but also that he understood that his guilty plea means that he is waiving those rights. This Court, however, has never held that, as a constitutional matter, the defendant must be specifically advised by the court that his guilty plea waives all of his constitutional trial rights. Indeed, while Rule 11(c)(4) expressly requires the district court to advise the defendant that, "by pleading guilty * * * the defendant waives the right to a trial,"[11] the Rule does not expressly require the district court to advise the defendant that a guilty plea waives certain rights that he would have at a trial, including the right to

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[11] The district court complied with that aspect of Rule 11 in this case. See J.A. 39-40, 58 (explaining to respondent that, by pleading guilty, he would be "giving up certain rights," including the right to a trial).

counsel and the right to confront and cross-examine witnesses. For constitutional purposes what is significant is that the record establishes that the defendant was aware of the trial rights given up by a guilty plea, not the precise moment at which he was given that information.[12]

5. Under The Proper Standard And Scope of Appellate Review, Respondent's Convictions Should Be Affirmed

Finally, respondent contends (Br. 46-49) that the district court's Rule 11 error requires reversal under any standard or scope of review for prejudice. That contention should be rejected. Respondent was advised more than once, both orally and in writing, that he had the right to counsel, including appointed counsel, at every stage of the proceedings; each time he confirmed his understanding of his rights. See J.A. 15, 18, 22, 25, 26, 28. Nothing in the record suggests, nor has respondent argued, that he had any impediment to understanding that information. Moreover, contrary to respondent's suggestion now that he might not have truly wanted to plead guilty (Br. 48), the record shows that respondent was eager to enter a guilty plea to the armed robbery charge, and that his lawyer persuaded the district court not to accept a plea until he could consult further with respondent. J.A. 31-33. After that further consultation, respondent persisted in his determination to enter a guilty plea to the armed robbery

[12] Respondent also renews his argument (Br. 45-46) that the purposes of the raise-or-forfeit rule were satisfied by the fact that the prosecutor brought to the district court's attention that it had not complied fully with Rule 11(c)(3). On that point we refer the Court to our discussion of the issue in our reply brief in support of our certiorari petition (at 6-8).

charge, even though he was also aware that he would have to face a trial on the firearm charge. J.A. 35-36. Indeed, he entered that plea without obtaining any agreement from the government about dismissal of charges or disposition of his sentence.

Respondent suggests (Br. 47-48) that he might not have adequately understood the nature of the firearm charge, and that he might have been confused about the element of "us[ing]" or "carr[ying]" a firearm under 18 U.S.C. 924(c) (1994 & Supp. V 1999), especially since one of the government's theories was that he could be held responsible under the *Pinkerton* doctrine for his co-conspirators' violations of Section 924(c) (see J.A. 55). But respondent did not argue in the court of appeals that his guilty plea was unintelligent because he had not understood the nature of the firearm charge against him or that the district court had not adequately explained that charge to him. Nor did the court of appeals suggest that respondent's guilty plea was invalid on that basis. While respondent now argues that he had a potential defense to the Section 924(c) charge, he made a calculated decision, after consultation with counsel, not to contest that charge. Respondent may now regret having pleaded guilty, but his pleas were voluntary and intelligent, made after receiving advice about his constitutional rights and with full information about the nature of the charges against him. There is therefore no basis for vacatur of those pleas.

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For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

AUGUST 2001